FILED
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JOSEPH F. SPANIOL, JR.
CLERK

89-1309

CASE NO.: _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

RICHARD H. THIER,

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1.

WHETHER THE RULING BY THE FIFTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE THAT THE GOVERNMENT DID NOT VIOLATE ITS PLEA AGREEMENT WITH THE Petitioner CONFLICTS WITH THAT OF THE SECOND CIRCUIT COURT OF APPEALS IN UNITED STATES V. CORSENTINO, 685 F.2D 48 (2D CIR.1982), AND IN UNITED STATES V. CARBONE, 739 F.2D 45 (2D CIR.1986), AND FURTHER CONFLICTS WITH THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN UNITED STATES V. CRUSCO, 536 F.2D 21 (3D CIR.1976), AND THE EIGHTH CIRCUIT COURT OF APPEALS IN UNITED STATES V. MCCRAY, 849 F.2D 304 (8TH CIR.1988).

2.

WHETHER THE IMPOSITION BY THE TRIAL COURT OF CONSECUTIVE SENTENCES VIOLATED THIS COURT'S HOLDING IN BLOCKBURGER V. UNITED STATES, 284 U.S. 299, 53 S.CT. 180, 76 L.ED.2D 306 (1932), AND THE HOLDING OF THE NINTH CIRCUIT COURT OF APPEALS IN UNITED STATES V. ANDERSSON, 813 F.2D 1450 (9TH CIR.1987).

LIST OF INTERESTED PARTIES

TRIAL JUDGE	John M. Duhe, Jr.
PETITIONER	Richard H. Thier
UNITED STATES OF AMERICA	Judith A. Lombardino Assistant United States Attorney
ATTORNEY FOR PETITIONER	Alvin E. Entin, Esq. Entin, Schwartz, Margules & Lazarus
ALLEGED VICTIMS	None

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CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD H. THIER,

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH JUDICIAL CIRCUIT

The Petitioner, RICHARD H. THIER, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Judgment and Commitment Order of the District Court is reprinted herein. (A 1-7). The opinion of the Court of Appeals for the Fifth Circuit affirming the Judgment of the District Court in United States v. Thier, Case No. 88-4811, 5th Cir.1989), was rendered on October 26th, 1989, and is reprinted herein. (A 8-35). The Petitioners' timely-filed Petition for Rehearing was denied by the Court on December 11th, 1989. (A 36-37).

STATEMENT OF JURISDICTIONAL GROUNDS

This Petition arose in the first instance from criminal charges filed in the District Court for the Western District of Louisiana. The Judgment and Commitment Order rendered by the Court was appealed to the United States Court of Appeals for the Fifth Circuit pursuant to the jurisdiction vested in the Court by 28 U.S.C. 1291.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1254.

STATUTES AND REGULATIONS INVOLVED

18 U.S.C. 371

If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. § 841(a)(1)

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

Title 18 U.S.C. § 4505

(a) Whenever confined and serving a definite term or terms of more than one

year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the

prisoner may be released on parole at such time as the Commission may determine.

21 U.S.C. 952(a)

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of Subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of Subchapter I of this chapter . . . .

STATEMENT OF THE CASE

On December 3, 1984, the Petitioner, RICHARD H. THIER, and twenty two co-defendants were indicted by a Federal grand jury sitting in the Western District of Louisiana. The indictment contained 18 counts. THIER was charged in Count I with conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, in Count II with conspiracy to import marijuana in violation of 21 U.S.C. § 952(a) and 963, in Count III with conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1), 841(b)(6), and 846, in Counts IV and XVIII with distribution of marijuana in violation of 21 U.S.C. § 841(a)(1), 841(b)(6), and 846, in Counts XIV and XVII with possession of marijuana with intent to distribute in violation of 21 U.S.C. § 955a(a), in Count XV with possession of marijuana with intent to

import it into the United States in violation of 21 U.S.C. § 955a(d), and in Count XVI with importation of marijuana in violation of 21 U.S.C. § 952a.

THIER entered into negotiations with the government which culminated in the execution of a plea agreement on January 8, 1987. (A 38-47). Pursuant to the terms of plea agreement, the indictment filed against the Petitioner was ultimately dismissed, and the Petitioner pleaded guilty to a four count Bill of Information filed on August 7, 1987. (A 48-54).

The Bill of Information charged the Petitioner in Count I with conspiracy to defraud the United States of income tax monies in violation of 18 U.S.C. 371, in Count II with importation of marijuana in violation of 21 U.C.A. § 952(a), in Count III with possession of marijuana with intent to distribute, in violation of 21

U.S.C. § 841(a)(1), and in Count IV with distribution of marijuana in violation of 21 U.S.C. § 841(a)(1).

The Petitioner was sentenced by the Court on October 21, 1988.

Contrary to the agreement entered into between Mr. THIER and the government, the government made recommendations and objections which affected the duration and severity of the Petitioner's sentence. Specifically, the Petitioner's request that he be sentenced pursuant to 18 U.S.C.A. § 4205(b)(2) was opposed by the government, as was his request that the Court recommend that his term of incarceration be served in a level 1 (minimum security) facility.

An Amended Judgment and Commitment Order was rendered by the Court on January 25, 1989. (A 1-7). The Petitioner was sentenced to the maximum term possible under the plea agreement. The sentence

was rendered pursuant to 18 U.S.C. § 4205(a), rather than 18 U.S.C. § 4205(b)(2), which adversely affected his parole eligibility. The Court did not recommend his placement in a level 1 institution. Mr. THIER received consecutive five-year sentences on each count of the Bill of Information, even though Count III of the Information, possession of marijuana with intent to distribute, and Count IV, distribution of marijuana, constituted a single transaction.

The Petitioner's Notice of Appeal to the United States Circuit Court for the Fifth Circuit was timely-filed on November 2, 1988. (A 55-56). The Fifth Circuit affirmed the trial court's judgment and sentence on October 26th, 1989. (A 8-35). The Petitioner filed a Motion for Rehearing and Suggestion for Rehearing In Banc on November 7th, 1989. Subsequently,

a Revised Petition for Rehearing was filed, deleting the request for en banc consideration. (A 57-61). It was denied by the Court on December 11, 1989. (A 36-37).

ARGUMENT

1.

WHETHER THE RULING BY THE FIFTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE THAT THE GOVERNMENT DID NOT VIOLATE ITS PLEA AGREEMENT WITH THE PETITIONER CONFLICTS WITH THAT OF THE SECOND CIRCUIT COURT OF APPEALS IN UNITED STATES V. CORSENTINO, 685 F.2D 48 (2D CIR.1982), AND IN UNITED STATES V. CARBONE, 739 F.2D 45 (2D CIR.1986), AND FURTHER CONFLICTS WITH THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN UNITED STATES V. CRUSCO, 536 F.2D 21 (3D CIR.1976), AND THE EIGHTH CIRCUIT COURT OF APPEALS IN UNITED STATES V. MCCRAY, 849 F.2D 304 (8TH CIR.1988).

In the Plea Agreement entered into by and between the Petitioner and the United States, the government agreed that:

> The United States also agrees that it will not take a position as to what the actual term of imprisonment in this matter should be. (A 44).

Nevertheless, at the sentencing of the Petitioner, when the Court was requested to sentence the Petitioner pursuant to Title 18 U.S.C. § 4205(b)(2), as opposed to Title 18 U.S.C. § 4205(a), and requested a recommendation to the Bureau of Prisons that Mr. THIER be designated to

a Level I (prison camp) institution, the government, in violation of its agreement with the Petitioner, objected, stating:

> **MS. LOMBARDINO:** Your honor, as to those requests, in particular, the Security Level I facility, the United States would object for the reason that we would not want to tell the Bureau of Prisons what level of security this defendant should be, if he should be sentenced to a term of imprisonment. We have no problems with this Court making a recommendation that he be incarcerated, if that should occur, in a facility near his family.
>
> As to the 4205(b)(2) sentence, Your Honor, this Court has consistently throughout these proceedings and other proceedings sentenced all defendants under 18 U.S.C. 4205(a) and the United States does not see any reason for deviating at this time from that practice.

The seminal case involving broken promises of the government, which had been solemnly given to a defendant in order to induce him to plead guilty, is United States v. Santobello, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971). Santobello was indicted on two State

felony counts under New York statutes. After negotiating a plea through his attorney, he withdrew his not guilty plea, and entered a guilty plea to a lesser charge. The prosecution agreed to make no recommendation as to the sentence to be imposed.

At the sentencing, a prosecutor who had not been involved in the plea negotiations appeared, and recommended the maximum sentence. Despite the objections of Santabello's attorney, the Court sentenced Santobello to the maximum sentence. Even though the trial court judge announced that he was not influenced by the prosecutor's recommendation,[1] and was

[1] The trial judge stated (as cited in the opinion of the Supreme Court at 30 L.Ed.2d 431):

> Mr. Aronson [Defense Counsel], I am not at all influenced by what the District Attorney says, so that there is no need to adjourn the sentence, and there is no need to have any testimony. It doesn't make a particle of difference what the District

influenced solely by the probation report, the United States Supreme Court reversed, stating (at 30 L.Ed.2d 433):

> . . . when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Several circuits have found the conduct engaged in by the government in the instant case to require reversal or resentencing. These decisions directly conflict with the decision of the Fifth Circuit in the instant case.

For instance, in United States v. Corsentino, 685 F.2d 48 (2d Cir.1982), the government promised to take "no position" at sentencing. When the government at sentencing expressed opposition to the sentencing of Corsentino under § 4205(b)(2), the Defendant raised no

> Attorney says he will do, or what he doesn't do.

objection. Nevertheless, the Second Circuit vacated the Defendant's sentence, and remanded for resentencing before a different judge. id. 685 F.2d at 52.

As in the instant case, the government argued on appeal that its promise to "take no position" did not encompass its opposition to the sentence consideration requested by the Petitioner herein. But the court in Corsentino found that:

> . . . a plausible interpretation is that once the issue of guilt had been resolved by entry of a plea, the Government would make no comment to the sentencing judge, either orally at sentencing or in writing prior to sentencing, that bears in any way upon the type or severity of the sentence to be imposed. (Emphasis supplied).

In United States v. Carbone, 739 F.2d 45 (2d Cir.1984), the Court considered a closely analogous factual situation. In Carbone, the government entered into a plea agreement with the defendant, in which it agreed that it would, "make no recommendation to the sentencing judge as

to the sentence which Stephen Carbone may be given . . . ."

The Court sentenced Carbone to serve thirty (30) months imprisonment. The defendant then requested a "split sentence" under Title 18 U.S.C. § 3651, under which Carbone would serve at most six months in prison, with the rest of the sentence being suspended. The prosecutor strenuously objected.

The Second Circuit reversed and remanded for sentencing before a different judge, citing Corsentino, supra. The Court ruled that the most plausible interpretation of the government's promise was that it covered the entire sentencing hearing. Even though sentence had already been imposed, the Court stated (739 F.2d at 47):

> If the government had wished to limit its promise solely to the portion of the sentencing hearing prior to the judge's initial statement of his inclination as to sentence, it should

have stated so explicitly.

The Eighth Circuit was confronted with exactly the same factual situation extant in the case at bar in United States v. McCray, 849 F.2d 304 (8th Cir.1988). In McCray, the Defendant signed a plea agreement with the United States in which the government agreed to make no recommendation as to sentence. Despite that promise, at the defendant's sentencing, the government opposed a defense request for early parole consideration pursuant to Title 18 U.S.C. § 4205(b)(1).

Citing United States v. Carbone, and United States v. Corsentino, supra., the Court vacated the defendant's sentence and remanded for resentencing before a different judge. The Court further indicated that it was irrelevant whether the trial court was influenced or not by the government's opposition. The breach

of the plea agreement required resentencing. McCray, supra., 849 F.2d at 305.

2.

WHETHER THE IMPOSITION BY THE TRIAL COURT OF CONSECUTIVE SENTENCES VIOLATED THIS COURT'S HOLDING IN BLOCKBURGER V. UNITED STATES, 284 U.S. 299, 53 S.CT. 180, 76 L.ED.2D 306 (1932), AND THE RULING OF THE NINTH CIRCUIT COURT OF APPEALS IN UNITED STATES V. ANDERSSON, 813 F.2D 1450 (9TH CIR.1987).

In Counts III and IV of the Bill of Information, the Defendant was charged with possessing approximately 19,000 pounds of marijuana with the intent to distribute it, and with distributing the same marijuana, all on or about december 2, 1979. This Court has long abided by the tenet that, if the evidence relates to a single transaction, the Defendant cannot be sentenced separately for both offenses. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

In Blockburger, this Court stated:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Accord, Gore v. United States, 3576 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1959).

The decision of the Fifth Circuit also is in direct conflict with United States v. Andersson, 813 F.2d 1450 (9th Cir.1987). In Andersson, the Court vacated the defendant's sentence for violation of the Blockburger rule, where the defendant had been convicted and given separate sentences for possession of cocaine with intent to distribute, and distribution of cocaine.

The same result, and the same conclusion were reached by the Seventh Circuit Court of Appeals in United States v. Piccolo, 696 F.2d 1162 (7th Cir.1983).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted, the sentences imposed by the district court vacated, and the case remanded for resentencing before a different judge.

Respectfully Submitted,

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ENTIN, SCHWARTZ,
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2450 N.E. Miami Gardens Drive
Second Floor
(305) 932-0550

PROOF OF SERVICE

COMES NOW, Alvin E. Entin, Esq., on behalf of the Petitioner, RICHARD H. THIER, and states to this Court:

1) That on February , 1990, the attached Writ of Certiorari submitted on behalf of the Petitioner was mailed at the United States Post Office, Miami, Florida.

2) I certify that a true and accurate copy of the foregoing Writ of Certiorari has been furnished to Judith A. Lombardino, Assistant United States Attorney, 500 Fannin Street, Shreveport, Louisiana 71101.

3) Said statement is being submitted to this Court pursuant to Rule 28.2 of the Rules of the Supreme Court.

Respectfully submitted,

ENTIN, SCHWARTZ, MARGULES & LAZARUS
2450 N.E. MIAMI GARDENS DRIVE
SECOND FLOOR
MIAMI, FLORIDA 33180
(305) 932-0550

_____
ALVIN E. ENTIN, ESQ.

SWORN TO AND SUBSCRIBED before me this

____ day of February, 1990.

_____
NOTARY PUBLIC, STATE OF FLORIDA

My commission expires:

89-1309

Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.: _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

RICHARD H. THIER,

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

APPENDIX TO JURISDICTIONAL STATEMENT

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Counsel for the Petitioner

62 pp

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

AMENDED JUDGMENT IN A CRIMINAL CASE
CASE NO. CR84-60055-23 "L"
JUDGE JOHN M. DUHE, JR.

MR. DONALD L. GRAHAM and
MR. D. MARK BIENVENUE
Attorney for Defendant

UNITED STATES OF AMERICA

v.

RICHARD H. THIER

THE DEFENDANT ENTERED A PLEA OF:

[X] guilty [ ] nolo contendere as to count(s) I, II, III and IV of the superseding bill of information filed 7-30-87, and [ ] not guilty as to count(s) _____.

THERE WAS A:

[X] finding [ ] verdict of guilty as to count(s) I, II, III and IV of the superseding bill of information filed 7-30-87.

THERE WAS A:

[ ] finding [ ] verdict of not guilty as to count(s)_____

_____

____.

[ ] judgment of acquittal as to count(s)

_____

_____.

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Conspiring to defraud the United States of America, in violation of 18 USC § 371, as charged in Count I of the superseding bill of information; Aiding and abetting others to import marijuana into the United States of America, in violation of 21 USC § 952(a), as charged in Count II of the superseding bill of information; Aiding and abetting others to possess with intent to distribute marijuana, in violation of 21 USC § 841(a)(1), as charged in Counts III and IV

of the superseding bill of information.

IT IS THE JUDGMENT OF THIS COURT THAT: On Count I the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of five (5) years.

IT IS THE FURTHER JUDGMENT OF THIS COURT THAT: On Count II the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of five (5) years. Said sentence on Count II to run consecutively to the sentence imposed on Count I.

IT IS THE FURTHER JUDGMENT OF THIS COURT THAT: On Count III the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of five (5) years.

Said sentence on Count III to run consecutively to the sentence imposed on

Count II.

IT IS THE FURTHER JUDGMENT OF THIS COURT THAT: On Count IV the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of five (5) years.

Said sentence on Count IV to run consecutively to the sentence imposed on Count III.

IT IS THE FURTHER JUDGMENT OF THIS COURT THAT: The defendant serve three (3) consecutive two-year special parole terms to commence upon his release from custody.

January 23, 1989

/s/
JOHN M. DUHE, JR.
UNITED STATES CIRCUIT JUDGE
(Sitting by Designation)

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a

law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $200.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) I, II, III and IV as follows:

IT IS FURTHER ORDERED that counts_____ _____are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant

shall pay to the United States Attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States Attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States Marshal of this district.

[x] The Court orders commitment to the custody of the Attorney General and recommends: That to the extent that it is convenient to the United States Bureau of Prisons, that the defendant be allowed to serve his sentence as near as possible to the location of his family.

Date of Imposition of Sentence: October 21, 1988

/s/ John M. Duhe, Jr.

Signature of Judicial Officer

JOHN M. DUHE, JR., UNITED STATES CIRCUIT JUDGE, (Sitting by Designation)
Name and Title of Judicial Officer

January 23, 1989

RETURN

I have executed this Judgment as follows:

_____.

Defendant delivered on _____
to _____
(Date)
at _____
_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By: _____
Deputy Marshal

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4811

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICHARD H. THIER,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

(CR-84-60055-23-L)

(October 26, 1989)

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge:[1]

JERRY E. SMITH, Circuit Judge:[2]

[1] District Judge of the Western District of Louisiana, sitting by designation.

[2] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-

A criminal defendant seeks resentencing before a different judge after receiving the maximum sentence authorized by a plea bargain agreement. We find no evidence that the government improperly induced the guilty plea or breached any written or oral representations made to the defendant. Concluding that the defendant made a well-informed and voluntary decision to plead guilty to certain charges personally selected by him, we affirm.

I.

Facts.

Attorney Richard Thier was indicted by a federal grand jury on charges relating to money-laundering and drug-trafficking. More than twenty co-defendants were named

settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

in an eighteen-count indictment. Thier was charged in nine of the counts,[3] exposing him, if convicted, to possible life imprisonment.

The government and Thier engaged in plea negotiations, successfully reaching an agreement on January 8, 1987, with Thier personally participating in the discussions. The government agreed to dismiss the indictment and to substitute

[3] Under the original indictment, Thier was charged with violating the following: 21 U.S.C. § 848 (continuing criminal enterprise); 21 U.S.C. §§ 952(a) and 963 (conspiracy to import 245,000 pounds of marihuana); 21 U.S.C. §§ 841(a)(1), 841(b)(6), 846 (conspiracy to possess with intent to distribute 245,000 pounds of marihuana); 21 U.S.C. §§ 841(a)(1), 841(b)(6), 846 (distribution of 60,000 pounds of marihuana); 21 U.S.C. § 955a(a) (possession of 60,000 pounds of marihuana with intent to distribute); 21 U.S.C. § 955a(d) (possession of marihuana with intent to import it into the United States); and 21 U.S.C. § 952a (importation of 60,000 pounds of marihuana).

a four-count bill of information against Thier. In exchange, Thier agreed to plead guilty to certain drug offenses, chosen by him, that would expose him to a minimum of fifteen years' imprisonment. In addition, the government required Thier to plead guilty to the additional charge of "money laundering" with intent to defraud the Internal Revenue Service (IRS) pursuant to 18 U.S.C. § 371. The money-laundering charge potentially exposed Thier, as agreed by both parties, to five additional years' imprisonment. Consequently, Thier, as a quid pro quo for dismissing the original indictment, exposed himself to a maximum of twenty years in prison.

Before accepting Thier's plea of guilty, the district judge questioned Thier in open court to ensure that the plea was well-informed and not the result of coercion, threats of force, or false promises. See Fed. R. Crim. P. 11. The

judge explained to Thier all the charges and the elements which the government would have to prove for each charge in order to convict him. The following relevant exchange then took place:

> The court: And you understand that you face a maximum possible total on all counts of twenty years of imprisonment and a fine of $60,000? Do you understand that?
>
> Thier: Yes, sir.

After hearing the testimony of the government and an IRS special agent, the court separately concluded that a basis in fact had been established for acceptance of the guilty plea.

On October 21, 1988, Thier was sentenced to consecutive five-year terms for each of the four counts contained in the superseding bill of information[4] -- the

[4] Count I charged Thier with conspiracy to defraud the United States of income taxes (18 U.S.C. § 371); count II involved importation of marihuana (21 U.S.C. § 952(a)); count III charged Thier with possession with intent to distribute (21 U.S.C. § 841(a)(1)); and count IV

twenty-year maximum as provided in the plea bargain.[5] Prior to the sentencing, Thier apparently requested, in writing, that the government agree to abide by the sentencing guidelines outlined at 18 U.S.C. § 4205(b)(2) (immediate parole eligibility),[6] that the government reduce

charged him with distribution of marihuana (21 U.S.C. § 841(a)(1)).

[5] Exhibit B to the plea bargain agreement states in relevant part, "Defendant also understands and agrees that the [t]otal possible maximum term of imprisonment is 20 years, total maximum fine $60,000, or both."

[6] On October 12, 1984, Congress repealed 18 U.S.C. § 4205 incident to the passage of a continuing resolution for fiscal year 1985. See Pub. L. No. 98-473, tit. II, § 218(a) (5), 98 Stat. 2027 (1984). However, Congress delayed the effective date of the repeal for five years. See id. § 235(b) (1)(A), 98 Stat. 2032. Consequently, Thier's parole eligibility is controlled by § 4205, as this case falls within the five-year window.

his prison exposure to fifteen years, and that the government recommend level 1, minimum security incarceration. These proposals were rejected by the government and not included in the final agreement.

The government believed that Thier's management of the drug operation and his use of complicated domestic and foreign "money laundering" corporations did not merit such leniency. The sentencing judge declined to apply the more favorable guidelines, as requested by Thier at his sentencing hearing, and instead applied section 4205(a) (parole eligibility only after serving one-third of sentence).

On appeal, Thier asserts that the government failed to fulfill its obligations under the plea agreement. According to him, resentencing before a different judge is merited because (1) the government "opposed" the application of the favorable sentencing guidelines and

"opposed" any recommendation for minimum security despite its "promise" to stand silent; (2) the sentencing judge allegedly did not establish a factual basis to accept the guilty plea; (3) consecutive sentences under counts III and IV of the superseding bill of information constitute double jeopardy; and (4) sentencing took place after the effective date of the new sentencing guidelines, and thus he is entitled to retroactive application of their more lenient provisions.

II.

Standard of Review.

The trial court must establish "to its subjective satisfaction" that the plea bargain requirements of Fed. R. Crim. P. 11 are satisfied: absence of coercion, understanding of the charges, and knowledge of the consequences of the plea.[7]

[7] See United States v. Jack, 686 F.2d 226, 229 (5th Cir. 1982); Frank v. Blackburn, 646 F.2d 873, 881-82 (5th Cir.

For purposes of appeal, we do not require the trial judge to make formal findings concerning each factual determination mandated by rule 11. Frank, 646 F.2d at 882. Instead, "we are warranted in regarding the court's acceptance of the plea as a positive finding on each, reviewable under the clearly erroneous standard." Dayton, 604 F.2d at 940-41.

Accordingly, we apply the clearly erroneous standard to determine whether the trial judge accepted Thier's guilty plea in conformity with rule 11. However, the double jeopardy and retroactivity issues raised herein involve questions of law, requiring us to review those questions de novo. See Price v. Drexel

1980), modified on other grounds, 646 F.2d 902 (5th Cir. Jan. 1981) (en banc) (per curiam), cert. denied. 454 U.S. 840 (1981); United States v. Dayton, 604 F.2d 931, 939-41 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980).

Burnham Lambert. Inc., 791 F.2d 1156, 1159 (5th Cir. 1986).

III.

A.

Breach of Plea Bargain.

Thier contends that the government breached its plea bargain when, at sentencing, it opposed minimum security confinement and similarly opposed sentencing pursuant to section 4205(b)(2) (providing for immediate parole eligibility). He argues that United States v. Santobello, 404 U.S. 257 (1971), established the rule that the government bears a heavy responsibility to act with integrity when soliciting pleas. Thier asserts that any breach by the government -- whether material or not -- inducing a criminal defendant to plead guilty in reliance upon written or verbal representations constitutes grounds for either withdrawal of the plea or

resentencing.[8]

Thier points to the following language in the plea bargain as the source of the government's alleged broken promise: "The United States also agrees that it will not take a position as to what the actual term of imprisonment in this matter should be" (emphasis added). He interprets this provision as requiring the government to "stand mute" on any matter that could affect the total length of imprisonment. Since the government opposed the application of section 4205(b)(2) and its more liberal parole provision, Thier

[8] The Santobello Court stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. See also United States v. Shanahan. 574 F.2d 1228, 1230 (5th Cir. 1978) (Santobello requires strict adherence, by the government, to terms of plea bargain); accord United States v. Grandinetti. 564 F.2d 723, 725-26 (5th Cir. 1977).

believes that the government breached its promise and asserts that he is entitled to resentencing.

The government responds that it breached no promise under the plea bargain and did not improperly induce the guilty plea. It notes that the plea bargain spoke only in terms of the maximum prison sentence available for Thier (twenty years). The government contends that sentencing pursuant to section 4205(b)(2) and minimum security confinement were expressly rejected by the government and not included in the agreement.

We conclude that Thier offers an unreasonable and strained interpretation of the agreement. Reliance upon Santobello and its progeny is misplaced in this case, as it is evident that the government breached no promise in the plea agreement: It never promised to stand mute on the issues of parole and minimum

security confinement. Santobello becomes an issue only when the government breaches an express written or oral agreement.

Consistent with its promise in this case, the government took no position with respect to the prison sentence; nor did it recommend concurrent or consecutive sentences to the trial judge.

Instead, the government stood mute while the district court sentenced Thier. Unfortunately for Thier, the trial judge chose to sentence him to the maximum term available under the plea bargain -- a written agreement which Thier admitted he fully understood and accepted. Moreover, the sentence was imposed only after the court held a rule 11 hearing and it was established to its subjective satisfaction that Thier's plea was voluntary, informed, and based upon sufficient factual findings. See United States v. Antone, 753 F.2d 1301, 1305 (5th Cir.) (prosecutor

must present evidence to subjective satisfaction of court that defendant committed offense), cert. denied. 474 U.S. 818 (1985).

The government directs us to the following exchange that took place at the rule 11 hearing, to illustrate that Thier's informed consent is not subject to serious dispute:

The court: Has anyone made any promises to you as to what the sentence imposed upon you would be if you pleaded guilty?

Thier: No, sir.
The court: And you understand that you face a maximum possible total on all counts of 20 years of imprisonment and a fine of $60,000? Do you understand that?

Thier: Yes, sir.

The court: Then am I to understand, Mr. Thier, that you wish to enter a plea of guilty to each of the four counts of the Bill of Information simply because you are in fact guilty?

Thier: Yes, sir.

The court: Then how do you plead to each of those counts?

Thier: Guilty.

At no time did the government agree to stand silent with respect to the unrelated issues of parole eligibility or place of confinement. Thier essentially wants this court to read into the plea bargain very broad implied promises based upon his understanding of the agreement; we decline that invitation. Because the government had expressly rejected Thier's parole and confinement recommendations in prior negotiations, we find unpersuasive his self-serving argument that he understood that the government would act differently.[9]

Thier argues in the alternative that the plea bargain is ambiguous concerning the meaning of "actual term of imprisonment." Specifically, he contends that it is

[9] Curiously, at the sentencing hearing Thier's counsel never objected when the government announced that it would not endorse Thier's eleventh-hour pleas for favorable parole and confinement.

uncertain whether the phrase means a sentence imposed pursuant to the plea bargain, or the sentence actually served considering opportunities for parole. Their suggests that, pursuant to settled principles of contract law, ambiguities in the document must be construed against the drafter (here, the government).

Thier's argument has merit if the plea bargain negotiations are ignored completely. However, we are reminded by the government that throughout the negotiations it expressly rejected immediate parole eligibility for Thier. We accept the government's assertion that the written instrument embodies the prior negotiations and must be construed consistently with what the parties objectively, not subjectively, understood. Since the government consistently opposed early parole eligibility for Thier, we find as a matter of law that the phrase

"actual term of imprisonment" excludes consideration for parole in this case.[10] Accordingly, we conclude that the district court did not err in accepting Thier's guilty plea and in finding that the government acted consistently with its promise.

B.

Factual Basis for Guilty Plea.

Rule 11 requires that, before a guilty plea can be accepted,

"the prosecutor must present evidence to the subjective satisfaction of the district court which indicates that a defendant actually committed the offense to which he is pleading guilty." Antone. 753 F.2d at 1305. To that end, the

[10] Concluding that the plea bargain is not ambiguous as to what the parties intended, we need not address the government's request that the entire plea bargain be withdrawn so that Thier can be prosecuted under the original eighteen-count indictment.

district court's factual inquiry must be "precise enough and sufficiently specific" to determine that the defendant's conduct was "within the ambit of that defined as criminal." Jimenez v. United States, 487 F.2d 212, 213 (5th Cir. 1973), cert. denied. 416 U.S. 916 (1974). Rule 11 does not impose a heavy burden of proof to support a conviction. See Dayton, 604 F.2d at 936-41 (all that is required is the trial judge's subjective satisfaction, as evidenced by the record of the rule 11 hearing).

In this case, the prosecutor presented the facts contained in the bill of information, those it would prove at trial, and the testimony of an IRS special agent. The government proffered these facts to show that Thier participated in the importation and distribution of 250,000 pounds of marihuana, that he used his legal expertise to set up foreign and

domestic corporations as an instrument to shelter profits, and that he acquired vessels -- with fictitious documentation - to haul the drugs into the United States.

After hearing such testimony, the district court found "that the factual basis is clearly set forth in the statement made by the -- on behalf of the government and the testimony of the [IRS agent]." On appeal, Thier does not specify the elements of the crimes outlined in the bill of information for which the government allegedly failed to establish a factual basis. Instead, he focuses upon general legal principles concerning prosecutorial integrity in plea bargaining without explaining how such principles are even implicated in this case. He also argues that he was not involved in the day-to-day operations of the drug conspiracy, a distinction we find to be irrelevant for purposes of vacating this

guilty plea.

The record of the rule 11 hearing demonstrates that the trial judge was subjectively satisfied with the quantum of proof against Thier and that, if anything, the court exceeded the procedural requirements of rule 11. That being so, the court did not err in accepting Thier's plea of guilty.

C.

Double Jeopardy.

The defendant also argues that Blockburger v. United States, 284 U.S. 299 (1932), proscribes the imposition of consecutive -or concurrent -- sentences for counts III and IV of the bill of information because they allegedly constitute a single offense. Count III charges Thier with unlawful possession of 19,000 pounds of marihuana with intent to distribute. whereas count IV charges Thier with unlawful distribution of the same

19,000 pounds.

The defendant correctly relies upon our decision in United States v. Hernandez. 591 F.2d 1019 (5th Cir. 1979) (en banc), for the proposition that possession "with intent to distribute" drugs, combined with "distribution" of those same drugs, will merge into a single offense unless there is proof of the defendant's prior possession before the actual distribution. United States v. Berkowitz, 662 F.2d 1127, 1141 (5th Cir. Unit B Dec. 1981). Since the 19,000 pounds of marihuana cited in the bill relates to a single criminal transaction, Thier argues, counts III and IV should have been merged so as to avoid impermissible pyramiding of sentences. We find Thier's reliance upon Hernandez to be misplaced, however, because that case involved a jury conviction upon the separately charged offenses. Consequently, the case is distinguishable,

because the defendant in Hernandez chose not to waive his constitutional protection against double jeopardy.

In this case, however, Thier waived his double jeopardy challenge by pleading guilty in the same fashion in which he knowingly and voluntarily waived his right to a jury trial. In fact, he selected counts III and IV to be included in the superseding bill of information in order to comply with the government's demand that he be exposed to a minimum twenty-year sentence.

It is well settled that constitutional rights may be knowingly and voluntarily waived.[11] In the instant case, Thier sought to reduce his exposure to possible

[11] See, e.g., Garner v. United States, 424 U.S. 648 (1976) (may waive fifth amendment self-incrimination protection); Johnson v. Zerbst. 304 U.S. 458 (1938) (may waive sixth amendment right to counsel).

life imprisonment if convicted pursuant to the original indictment. He and his counsel selected the charges now outlined in counts III and IV. It would be untenable to permit Thier, at this late date, to appeal successfully based upon his own well-informed selection of the charges to be included in the bill of information. In rejecting Thier's collateral attack upon his own plea, we remain faithful to recent, controlling jurisprudence.

In United States v. Broce, 109 S. Ct. 757 (1989), the Court upheld a plea bargain against a similar double-jeopardy challenge. The defendant in that case pled guilty to two separate conspiracies, determined in a later case to be only one criminal transaction. The Court concluded that no grounds existed to set aside the guilty plea, because the defendant relinquished his right to demonstrate the

existence of only one conspiracy at a trial-like proceeding. Id. at 763. As long as the separate counts to which the plea is entered contain "facial allegations of distinct offenses," the defendant, by entering the guilty plea, "concede[s] that he has committed two separate crimes." Id. Counts III and IV are in fact facially distinct: Count III charges possession with intent to distribute on or about December 2, 1979, and count IV charges distribution on or about December 3, 1979. Thus, the requirements of Broce are met, and strategic miscalculations made by the defendant cannot properly serve to upset an otherwise valid plea bargain and thereby earn him a second shot at sentencing.

We addressed the same double-jeopardy issue now raised by Thier with respect to a plea bargain involving one of his drug-

smuggling confederates, similarly unhappy with his sentence. In United States v. Soltis. 857 F.2d 790 (5th Cir. 1988) (per curiam) (unpublished), we stated that the defendant's "dissatisfaction with the sentence he was advised could be imposed creates no right to rue back his valid guilty plea bargain." As in this case, the potential for pyramiding was a well-known risk assumed by defendant Soltis.[12] Consequently, the Soltis panel rejected the double jeopardy challenge as being waived.

We conclude that Broce and Soltis control the outcome of this issue. Accordingly, we reject Thier's belated double-jeopardy challenge as being voluntarily

[12] Both Soltis and Thier were aware of the potential for pyramiding of punishment, since both submitted pretrial motions to merge the charges challenged here. These motions were denied by the respective district courts.

relinquished as a quid pro quo for the plea agreement.

D.

Retroactivity of Sentencing Guidelines.

The defendant reassures this court that a retroactive application of the more lenient parole provisions of the Sentencing Reform Act of 1984 would not offend the ex post facto clause of the Constitution. Unfortunately for Thier, we rejected this same retroactivity argument in United States v. Haines. 855 F.2d 199 (5th Cir. 1988).

In Haines, the defendant committed the crime before the November 1, 1987, effective date of the Sentencing Reform Act but entered a guilty plea and was sentenced thereafter.[13] In that case, the

[13] The Haines court noted that on December 7, 1987, Congress amended the 1984 enabling statute expressly to limit the application of the new guidelines to criminal offenses committed after November 1, 1987. See 855 F.2d at 200 (citing Sentencing Act of 1987, § 2(a), Pub. L.

defendant similarly sought the application of certain favorable Sentencing Reform Act provisions. Nevertheless, we rejected the retroactive application of the sentencing guidelines, because "it is clear that when Congress enacted the Sentencing Reform Act of 1984 it intended the new guidelines, when they were developed, to apply only to offenses committed on or after their effective date." 855 F.2d at 200-01. Accord United States v. Byrd, 837 F.2d 179, 181 (5th Cir. 1988) (citing legislative history).

In the case now before us, all crimes to which Thier pled guilty were committed between 1977 and 1981. The Sentencing Reform Act became effective on November 1, 1987, and Thier was sentenced on October 21, 1988. Our recent decision in Haines requires the application of pre-Reform Act

No. 100-182, 101 Stat. 1266).

guidelines, irrespective of Thier's invitation to the contrary. The district judge properly sentenced the defendant according to the law then in effect. Hence, the point in time at which sentence was rendered is irrelevant for purposes of this appeal.

IV.

In summary, Thier made a well-informed and voluntary decision to plead guilty to the charges he selected for inclusion into the bill of information. There is no evidence to suggest that the government induced this plea or failed to abide by its written and oral representations. Thier's appeal of his twenty year sentence, the maximum available under the plea bargain, does not entitle him to resentencing under the facts of this case.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4811

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD H. THIER,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING

(December 11, 1989)

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:

See FRAP and Local Rules 41
for stay of the Mandate.
ENTERED FOR THE COURT:

/s/ J. SMITH
United States Circuit Judge

*District Judge of the Western District of
Louisiana, sitting by
designation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CRIMINAL NO. 84-60055-23

SECTION L

UNITED STATES OF AMERICA *

VERSUS *

RICHARD H. THIER *

PLEA AGREEMENT

In consideration of the defendant, Richard H. Thier, entering a plea of guilty to a maximum possible term of imprisonment as set forth in the information contained in Exhibit B, and a basis in fact having been established by the Court pursuant to Rule 11, Federal Rules of Criminal Procedure, to accept said plea and, in consideration of the defendant's agreement to "fully cooperate," the United States agrees to the following, as more fully set out below.

By the term "fully cooperate" used herein, the defendant agrees to make a full, honest and truthful disclosure to the United States Attorney's Office, Western District of Louisiana, through its attorneys, investigators, agencies and departments, concerning his knowledge of all persons, and aspects of trafficking in controlled dangerous substances and laundering of funds derived therefrom, including any and all information, crimes, or offenses (including state or federal) related thereto or arising therefrom, as well as any information deemed to be of interest to the United States Attorney for the Western District of Louisiana.

Furthermore, the defendant agrees that he will provide full and truthful responses to all questions asked and he will voluntarily disclose complete knowledge and information regarding all matters which are of interest to the

United States Attorney, Western District of Louisiana. In addition, he will provide truthful testimony in any proceeding, including but not limited to grand jury, and at whatever trials the United States deems his testimony desirable. Under this agreement the defendant agrees that he is obligating himself to provide truthful testimony and unreserved disclosure regarding any and all of the above matters of which he has knowledge and information and to be available to the United States as requested.

It is further agreed that the defendant specifically waives his Fifth Amendment privilege against self-incrimination for the purposes of this agreement. Any false statements made by the defendant to the grand jury or at any court hearing or trial can and will be prosecuted under appropriate perjury

statutes. The United States reserves the right to verify by any reasonable means it sees fit any statements or testimony given by the defendant.

The United States agrees to process an application for Richard Thier and/or his immediate family, should circumstances dictate such action is necessary, in its Witness Protection Program at the appropriate time. Richard Thier understands that the final decision is that of the Department of Justice and no promises are made with regard to his admission in this program.

This plea agreement is also predicated on the defendant agreeing to provide to and/or release to the United States copies of all banking transactions with every bank, savings and loan, depository, financial institution or the equivalent of same at which the defendant has/had an account (of whatever nature,

including safety deposit boxes and the like) in his name, derivative of his name, an alias, or over which he has/had any interest, control or authority whatsoever, or in which he contributed thereto or conducts/conducted business therewith. The defendant hereby agrees in furtherance of this plea agreement to identify to and locate for the United States any and all things of value of whatever nature, property of whatever nature, assets of whatever nature and monies in whatever form, the ownership of which is/was in his name, derivative thereof, an alias, or over which he has/had any interest, control or authority or contributed thereto. The defendant further agrees to voluntarily forfeit to the United States of America all things of value, assets of whatever nature, property of whatever nature and monies in whatever form which are the result of alleged drug/money

laundering transactions, subject to the forfeiture agreement attached hereto as Exhibit A. The defendant also agrees to testify truthfully and candidly in any legal proceedings, if requested, as to his ownership interest in any assets acquired from illegal drug/money laundering transactions. The defendant agrees to voluntarily sign any waiver or releases of any kind in order to enable the United States to accomplish any of the above.

If the defendant does fully cooperate and comply with the obligations set forth herein, the United States, at the time of sentencing, will inform the District Court for the Western District of Louisiana of the nature and extent of such cooperation. Furthermore, if the defendant does fully cooperate and comply with the obligations contained in this agreement, the United States, after sentencing will move the District Court

for the Western District of Louisiana to dismiss all counts contained in Criminal Number 84-60055-23. The United States also agrees that it will not take a position as to what the actual term of imprisonment in this matter should be. The United States does recommend that a fine not be imposed in this matter based upon the defendant's agreement to forfeit the assets described in Exhibit A to the United States. The defendant understands that the sentencing court is not required to accept this recommendation (fine) and it is not binding on the sentencing court. The United States, however, reserves the right to provide factual information to the sentencing court. If the Court should accept the defendant's plea of guilty and should the defendant fully comply with his obligations as set forth above, the United States will not pursue any other criminal charges including civil or criminal

forfeitures against the defendant that occurred prior to the signing of this agreement, except perjury as explained above. This agreement not to prosecute constitutes a grant of immunity to Mr. Thier by the United States.

The defendant understands that sentencing is totally within the discretion of the Court.

If requested, the Office of the United States Attorney for the Western District of Louisiana or any official authorized under the Parole Commission guidelines to communicate with the Parole Commission will furnish a letter to the Parole Commission, making known the quality and quantity of Mr. Thier's cooperation. The United States further agrees that it will make known the extent and quality of Richard Thier's cooperation in other federal, state or foreign judicial districts and make that

cooperation (of which it is aware), if any, known to the Parole Commission.

The United States has the sole discretion to determine whether or not the defendant's disclosure and testimony amount to full cooperation within the terms of this agreement. It is further understood that, should the defendant knowingly fail to comply with any of the obligations set forth above or fail to knowingly comply with any of the terms or conditions set forth above, the United States may rescind this Plea Agreement and prosecute the defendant for any and all violations of law which the defendant may have committed.

This is the entire plea agreement between the defendant and the United States Attorney's Office in this case and is made knowingly, freely and voluntarily after due consultation with his attorney.

Signed at Lafayette Louisiana, this

8th day of January, 1987.

JUDITH A. LOMBARDINO
Assistant United States Attorney

DONALD L. GRAHAM, ESQ.
Counsel for Defendant

RICHARD H. THIER
Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CRIMINAL NO. 84-60055-23
Section L Judge Duhe

UNITED STATES OF AMERICA *

VERSUS *

RICHARD H. THIER *

BILL OF INFORMATION

THE UNITED STATES ATTORNEY CHARGES:

COUNT I

Beginning on or about April 22, 1977, continuing thereafter up to and including December of 1981 in the Western District of Louisiana and elsewhere, the defendant Richard H. Thier, and other persons both known and unknown to the United States of America did unlawfully, willfully and knowingly combine, conspire, confederate and agree together and with each other to defraud the United States of America by impeding, impairing, obstructing and

defeating the lawful governmental functions of the Internal Revenue Service of the United States Treasury Department in the ascertainment, computation, assessment, and collection of revenue, to wit: income taxes, by the means and in the manner following:

(a) The defendant, Richard H. Thier, and his co-conspirators willfully and knowingly conspired to import and distribute Schedule I controlled dangerous substances, and to launder the proceeds and profits of these illegal activities.

(b) As part of this conspiracy the defendant, Richard H. Thier, established and acted as an attorney and agent of corporations and entities, both domestic and foreign, which were used to acquire vehicles, boats, yachts, real estate, and businesses which were used both to facilitate the importation and

distribution of these Schedule I controlled dangerous substances and to conceal the profits made from such.

(c) As part of this conspiracy the defendant, Richard H. Thier, established and had authority over domestic and foreign bank accounts.

(d) As part of this conspiracy the defendant, Richard H. Thier, acted as an agent and nominee in real estate and other transactions to shield the identity of his co-conspirators and the extent of their income.

(e) As part of this conspiracy the defendant, Richard H. Thier, promoted and formulated investment opportunities and strategies for his co-conspirators to invest their illegal profits with anonymity.

(f) As part of this conspiracy the defendant, Richard H. Thier, transported and arranged for the transportation of

large amounts of United States currency abroad.

(g) As part of this conspiracy the defendant, Richard H. Thier, caused to be prepared false loan documents between co-conspirators and the corporations established for each to distort and conceal each co-conspirator's taxable income from the Internal Revenue Service.

OVERT ACTS

In furtherance of the conspiracy described in Count IV and to effect the object thereof, the defendant named therein and other persons both known and unknown to the United States of America, performed the following Overt Acts, among others not described herein, in the Western District of Louisiana and elsewhere:

1 . The defendant Richard H. Thier formed a corporation in the State of Florida in the name of Saffron, Inc., for

his co-conspirator Juan A. Cid-Molina.

2. The defendant Richard H. Thier caused to be opened and maintained a bank account in the name of Topaz Enterprises, Inc., a Panamanian corporation, at the Maduro and Curiel Bank, Curacao, Netherland Antilles, for his co-conspirator Juan A. Cid-Molina.

3. Richard H. Thier caused the deposit of approximately $170,000 received from Juan A. Cid-Molina to be deposited in the account of Topaz Enterprises at Maduro and Curiel Bank, Netherland Antilles.

4. The defendant Richard H. Thier prepared documents which purported to be a loan of $170,000 in U.S. currency from Topaz Enterprises, Inc., to Saffron, Inc., to open a restaurant and lounge known as Rogers on the Green, which he then and well knew was not in fact a loan.

All in violation of Title 18, United States Code, Section 371.

COUNT II

On or about December 2, 1979, in the Western District of Louisiana, the defendant Richard H. Thier, aided, abetted and assisted other persons both known and unknown to the United States of America and did knowingly and intentionally and unlawfully import into the United States of America from a place outside thereof approximately 19,000 pounds of marijuana, a Schedule I non-narcotic controlled substance in violation of Title 21, United States Code, Section 952(a).

COUNT III

On or about December 2, 1979, in the Western District of Louisiana, the defendant Richard H. Thier, aided, abetted and assisted other persons both known and unknown to the United States of America and did knowingly and intentionally and unlawfully possess with the intent to distribute approximately 19,000 pounds of

marijuana, a Schedule I non-narcotic controlled substance in violation of Title 21, United States Code, Section 841(a)(1).

COUNT IV

On or about December 3, 1979, in the Western District of Louisiana, the defendant Richard H. Thier aided, abetted and assisted other persons both known and unknown to the United States of America and did knowingly and intentionally and unlawfully distribute approximately 19,000 pounds of marijuana, a Schedule I non-narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)

JOSEPH S. CAGE, JR.
UNITED STATES ATTORNEY

JUDITH A. LOMBARDINO
Assistant United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CRIMINAL NO. 84-60055-23
Section L-Judge Duhe
Magistrate Methvin

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD H. THIER,

Defendant./

NOTICE OF APPEAL

Notice is hereby given that RICHARD THIER, the Defendant named above, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered on October 21, 1988.

Respectfully submitted,

RASKIN & GRAHAM, P.A.
Riverside Professional Building
744 NW 12th Avenue, Suite 200
Miami, Florida 33136
Telephone: (305) 324-4200

By:_____
DONALD L. GRAHAM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of October, 1988, to: Judith A. Lombardino, Esq., Assistant United States Attorney, Room 8B07, Federal Building, 500 Fannin Street, Shreveport, LA 71101, and Mark Bienvenue, Esq., Acadiana National Bank Building, 5th Floor, 700 St. John Street, Lafayett, Louisiana 70502.

DONALD L. GRAHAM, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 88-4811

UNITED STATES OF AMERICA,	:
	:
Plaintiff/Appellant,	:
	:
vs.	:
	:
RICHARD H. THIER,	:
	:
Defendant/Appellant.	:
	:

REVISED PETITION FOR REHEARING

COMES NOW the Defendant, RICHARD H. THIER, by and through undersigned counsel, and hereby petitions this Honorable Court pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, to rehear and reconsider its decision, rendered the 26th day of October, 1989, and as grounds therefore, states as follows:

1. Appellant raised several issues on appeal, all of which were considered by the Court.

2. In recognition of the rules governing rehearing the Appellant will address his arguments solely to the first issue raised in his brief, to wit:

THE GOVERNMENT VIOLATED ITS PLEA AGREEMENT WITH THE DEFENDANT BY OPPOSING HIS REQUEST FOR SENTENCING PURSUANT TO 18 U.S.C.A. § 4205(b)(2).

3. In deciding this issue for the government, and against Appellant, the Court did not cite one case from the Fifth Circuit, or from any other federal circuit in support of the decision.

4. In addition, the Court ignored and totally failed to distinguish several cases cited by the Appellant which are in direct conflict with its decision, to wit: United States v. Corsentino, 685 F.2d 48 (2d Cir.1982); United States v. Carbone, 739 F.2d 45 (5th Cir.1984); United States v. McCray, 849 F.2d 304 (8th Cir.1988); United States v. Brody, 808 F.2d 944 (2d Cir.1986).

5. The Court justifies this radical departure from existing case law by stating:

> The government responds that it breached no promise under the plea bargain and did not improperly induce the guilty plea. It notes that the plea bargain spoke only in terms of the maximum prison sentence available for Thier (twenty years). The government contends that sentencing pursuant to section 4205(b)(2) and minimum security confinement were expressly rejected by the government and not included in the agreement.

6. But the contentions of the government, relied upon by the court, were never part of the record of the instant case. They are merely argument of counsel, which the Appellant vigorously disputes. Argument of counsel is not evidence. See, e.g. United States v. Harris, 542 F.2d 1283, 1297 (7th Cir.1976).

7. It would be far more appropriate for this Honorable Court to remand the instant case for an evidentiary hearing to determine whether these out-of-court and

self-serving declarations of the government are true, rather than to decide the issue on the basis of off the record "testimony" by the government. It is not the function of the appellate court to search the record and analyze the evidence in order to supply findings not made by the trial court. Kelley v. Everglades Drainage Dist., 319 U.S. 415.

8. Thus, on this issue, the Court rendered an opinion which is unsupported by the case law, which conflicts with several cases which were apparently overlooked or not considered, and which is justified by unsupported and unverified statements by the government which are outside the record.

WHEREFORE, the Appellant, RICHARD H. THIER, hereby moves this Honorable Court to grant this motion for rehearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of defendant RICHARD H. THIER's Motion for Rehearing, has been placed in the U.S. mail, postage prepaid, this 15th day of November, 1989, to Assistant United States Attorney Judith A. Lombardino, 500 Fannin Street, Shreveport, Louisiana 71101.

Respectfully submitted,

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No. 89-1309

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD H. THIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the government violated its plea agreement with petitioner.

2. Whether the consecutive sentences imposed on petitioner violated his rights under the Double Jeopardy Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 8-35) is unpublished, but the decision is noted at 889 F.2d 272 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1989. A petition for rehearing was denied December 11, 1989 (Pet. App. 36). The petition for a writ of certiorari, styled a "Jurisdictional Statement," was filed on February 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After negotiating a plea agreement with the United States Attorney for the Western District of Louisiana, petitioner pleaded guilty to each of four counts of a bill of information (Pet. App. 48-54), including conspiracy to defraud the United States of income taxes, in violation of 18 U.S.C. 371; importation of marijuana, in violation of 21 U.S.C. 952(a); possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and distribution of marijuana, in violation of 21 U.S.C. 841(a)(1). He was sentenced to consecutive five-year terms of imprisonment on each of the four counts, for a total of 20 years' imprisonment. Pet. App. 1-7. The court of appeals affirmed.

1. The facts are stated in the opinion of the court of appeals. Pet. App. 9-15. Petitioner, an attorney, was initially charged in nine counts of an 18-count federal indictment in which more than 20 persons were charged with drug-trafficking and money-laundering offenses. The charges against petitioner exposed him, if convicted, to possible life imprisonment. *Id.* at 9-10.

The government and petitioner reached a plea agreement on January 8, 1987, with petitioner personally participating in the plea discussions. Petitioner agreed to plead guilty to drug-trafficking and money-laundering charges that would expose him to a maximum of 20 years' imprisonment in exchange for the government's agreement to dismiss all other charges. Pet. App. 10-11.

2. The district court questioned petitioner in open court before accepting his guilty plea. Pursuant to Fed. R. Crim. P. 11, the judge explained all the charges and the elements that the government would be required to prove. The court then asked peti-

tioner: "[Y]ou understand that you face a maximum possible total on all counts of twenty years of imprisonment and a fine of $60,000? Do you understand that?" Petitioner answered: "Yes, sir." Pet. App. 12. In addition, that maximum potential sentence was explicitly set forth in the plea agreement. *Id.* at 13 n.5.

Prior to sentencing, petitioner had requested in writing that the government agree to immediate parole eligibility, reduce his prison exposure to 15 years, and recommend incarceration in a minimum security facility. Those proposals were rejected by the government and not included in the final plea agreement (Pet. App. 38-47), because the government believed that petitioner's management of the drug importation and distribution operation out of which the charges arose did not merit such leniency. *Id.* at 13-14.

At the sentencing on October 21, 1988, the government was silent respecting the term of imprisonment that should be imposed by the judge (Pet. App. 20), but actively opposed petitioner's request for immediate parole eligibility and for incarceration in a minimum security facility. *Id.* at 18. Petitioner was sentenced to consecutive five-year terms of imprisonment on each of the four counts to which he pleaded guilty. He was not granted immediate parole eligibility and the sentencing judge did not recommend that prison authorities place petitioner in a minimum security facility. *See id.* at 1-7.

3. On appeal, petitioner sought resentencing before a different judge, arguing that the government had breached its plea agreement when it opposed petitioner's requests for immediate parole eligibility and minimum security incarceration. Petitioner argued that the government's opposition to his sentenc-

ing requests was precluded by the following sentence in the plea agreement: "The United States also agrees that it will not take a position as to what the actual term of imprisonment in this matter should be." Pet. App. 18.

The court of appeals ruled (Pet. App. 17-24) that the plea agreement, properly interpreted, precluded the government only from taking a position on the term of years to which petitioner would be sentenced. The court noted that "[a]t no time did the government agree to stand silent with respect to the unrelated issues of parole eligibility or place of confinement." *Id.* at 22. Because it found petitioner's interpretation of the plea agreement "unreasonable and strained" (*id.* at 19), especially in light of the history of the plea negotiations (*id.* at 23-24), the court held that the government had not breached its obligations under the plea agreement.

The court of appeals also rejected petitioner's contention that the Double Jeopardy Clause precluded consecutive sentences for both possession with intent to distribute and distribution of the same illegal drugs. Pet. App. 27-33. Although a previous Fifth Circuit decision had held that separately alleged offenses of possession with intent to distribute and distribution of the same drugs merged into a single offense, see *United States* v. *Hernandez*, 591 F.2d 1019 (5th Cir. 1979) (en banc), the court found this principle inapplicable because *Hernandez* did not involve a guilty plea or any other conduct waiving the defendant's double jeopardy protections. Pet. App. 28-29. In this case, by contrast, in exchange for dismissal of charges that exposed him to a potential sentence of life imprisonment (see *id.* at 10), petitioner had himself "selected [the two counts in question] to be included in the superseding bill of information [to

which he pleaded guilty] in order to comply with the government's demand that he be exposed to a minimum twenty-year sentence." *Id.* at 29. At the time of sentencing, petitioner was specifically informed of the possible sentence he could receive. *Id.* at 12. Relying on *United States* v. *Broce*, 109 S. Ct. 757 (1989), the Court held that petitioner's knowing waiver, coupled with the fact that the offenses to which petitioner pleaded guilty were facially distinct because the charged conduct occurred on two different days, see Pet. App. 30-31, led to the conclusion that petitioner had validly waived any possible double jeopardy challenge to the charges. *Id.* at 31.

ARGUMENT

1. Petitioner reasserts (Pet. 12-19) his claim that the government breached its plea agreement by opposing his requests for immediate parole eligibility and for minimum security confinement. He claims that the Fifth Circuit's ruling on that point creates a conflict among the courts of appeals. Contrary to petitioner's suggestion, no such conflict exists. This case turns entirely on a factual question concerning the meaning of petitioner's plea agreement. That question was correctly resolved against petitioner by the court of appeals and does not merit review by this Court.

In *Santobello* v. *New York*, 404 U.S. 257, 262 (1971), the Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." In this case, the government promised "that it will not take a position as to what the actual term of imprisonment in this matter should be." Pet. App. 44. In light of the history of the plea negotia-

tions, as well as the other specific terms of the agreement, the court of appeals construed this provision as pertaining only to the term of years imposed in the sentence, not the conditions of confinement or the prospects for parole. The court also ruled that petitioner, a lawyer who had participated directly in the plea negotiations, fully understood the limitations of the plea agreement. This was demonstrated by petitioner's unsuccessful request to the government prior to sentencing for it to take a favorable position on petitioner's parole eligibility and the conditions of his confinement.

Each of the four cases that petitioner claims to be in conflict with the court of appeals' decision involved different language in the plea agreement and a different negotiation history; in each of those cases, the court ruled that the government had breached the agreement as it was reasonably understood by the parties. See *United States* v. *McCray*, 849 F.2d 304, 305 (8th Cir. 1988) (per curiam) (government promised "not [to] make any recommendation as to the sentence to be imposed"); *United States* v. *Carbone*, 739 F.2d 45, 45 (2d Cir. 1984) (government would "make no recommendation to the sentencing judge as to the sentence which [defendant] may be given"); *United States* v. *Corsentino*, 685 F.2d 48, 49 (2d Cir. 1982) ("government agrees to take no position at sentence"); *United States* v. *Crusco*, 536 F.2d 21, 24 (3d Cir. 1976) ("[g]overnment would take no position as to maximum sentencing imposed in this case"). Because each of those cases turned on its own facts, the fact that the court of appeals in this case reached a result different from that reached in the four cases cited by petitioner does not imply the existence of a conflict among the circuits as to any question of law.

2. Petitioner also reasserts (Pet. 19-20) his argument that the count alleging drug possession with intent to distribute and the count alleging distribution of the same drugs constituted a single offense under the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), and that by imposing consecutive sentences for the two offenses the district court violated the Double Jeopardy Clause.

In *United States* v. *Broce*, 109 S. Ct. 757 (1989), this Court upheld a plea bargain that involved defendants' guilty pleas to two separate conspiracies that were later held to constitute only a single criminal transaction. The Court concluded that a plea-bargaining defendant relinquishes his right to raise a double jeopardy claim so long as the allegations to which he pleaded guilty, on their face, state two separate offenses. *Id.* at 763. In this case, the possession with intent to distribute offense and the distribution offense were alleged to have occurred on separate days. Thus the requirement of *Broce* was fulfilled. Petitioner fully understood that he was exposing himself to cumulative sentencing on these two offenses; he knowingly and intelligently waived his right to contest the cumulative sentences he actually received.*

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* Petitioner's assertion (Pet. 20) that the Fifth Circuit's decision conflicts with decisions of the Sixth and Ninth circuits, see *United States* v. *Andersson*, 813 F.2d 1450 (9th Cir. 1987); *United States* v. *Piccolo*, 696 F.2d 1162, aff'd en banc, 723 F.2d 1234, 1241 & n.2 (6th Cir. 1983), cert. denied, 466 U.S. 970 (1984), is mistaken. In both of the cases cited, the defendant—unlike petitioner—had been convicted following a jury trial in which the defendant preserved his double jeopardy claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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